Office Supreme Court, U. S.
FILED
OCT 4 1924
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

No. [redacted] 138

GREAT NORTHERN RAILWAY CO., PETITIONER,

vs.

GALBREATH CATTLE COMPANY AND ANNICE W. PHELPS AND FRANCES P. BELDEN, AS EXECUTRICES, ET AL., ETC., RESPONDENTS.

BRIEF FOR RESPONDENTS.

E. E. ENTERLINE,
SAMUEL HERRICK,
Attorneys for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 541.

GREAT NORTHERN RAILWAY CO., PETITIONER,

vs.

GALBREATH CATTLE COMPANY AND ANNICE W. PHELPS AND FRANCES P. BELDEN, AS EXECUTRICES, ET AL., ETC., RESPONDENTS.

BRIEF FOR RESPONDENTS.

I.

CASE NOT REMOVABLE TO FEDERAL COURT ON GROUND OF SUBJECT-MATTER.

This was not a suit arising under the Interstate Commerce Laws of the United States, but was merely one for damages to enforce a common-law liability. Section 6 of the complaint expressly absolves the original carrier from all liability whatsoever, while Sections 7 to 13, inclusive, set forth

that the negligence causing the loss occurred wholly within the State of Montana and was chargeable solely to the single carrier made the defendant. There is no violation of the Interstate Commerce Laws alleged by the complaint, nor any reference made to those laws or to the regulations of the Interstate Commerce Commission.

Such action is not a suit arising under "any law regulating commerce" within the meaning of the Judicial Code (Act March 3, 1911, chap. 231, 36 Stat., 1092), of which the District Court, by paragraph 1, is given jurisdiction regardless of citizenship, nor as based on the so-called Carmack Amendment to Section 20 of the act, embodied in Act of June 29, 1906, chapter 3591, Section 7 (34 Stat., 593), requiring the issuance of bills of lading for interstate shipments, the purpose of which is to make the carrier issuing such bills liable thereunder by statute for any loss or damage occurring on connecting lines.

Though there was an allegation in the complaint that the shipment was from a point in Wyoming to a point in Montana, we find that the same allegation was made in the complaint made the basis of the Winn case (213 U. S., 458, 465), but this Court held, nevertheless, that "the cause of action itself is not based upon the Interstate Commerce Law or upon any other law of the United States. The case could not have been brought originally in the Circuit Court of the United States, and was therefore not removable thereto."

In Storm Lake Tub and Tank Factory *vs.* Minneapolis & St. L. R. Co. (209 Fed., 895, 898), the petition set forth damages to a shipment from Storm Lake, Iowa, to St. Paul, Minnesota, and that defendant was engaged as a common carrier in the States of Iowa and Minnesota. The court ruled that "there is nothing in the petition of the plaintiff

in this case that shows even remotely that the cause of action therein alleged is one arising under the Constitution or any law of the United States," and accordingly the motion to remand to the State court was allowed. The situation in the case at bar is almost identical, except that here the case was not removed in the first instance.

A similar decision was rendered in Adams *et al. vs.* Chicago Great Western R. R. Co. *et al.* (210 Fed. Rep., 362), notwithstanding the fact that the Carmack Amendment (*supra*) authorized a recovery against the initial carrier for loss sustained through the fault of any carrier whose line formed a part of the through route. The District Court relied upon Tennessee *vs.* Union Planters Bank (152 U. S., 454) and subsequent cases, because the fact that the suit arose under the law of the United States did not appear from the plaintiff's petition, and such omission cannot be supplied by the petition for removal or any subsequent pleading.

The rule in Tennessee *vs.* Union Planters Bank was followed in a large number of cases for removal cited in Louisville and N. R. Co. *vs.* Mottley (211 U. S., 149, 154).

A recent case to the same effect is Great Northern Ry Co. *vs.* Alexander (246 U. S., 276, 281, 282), in which there was the same defendant as in the present case, it was represented by the same attorney, and he advanced the same contention, but this Court, through Mr. Justice Clarke, thus ruled:

> "But unfortunately for the validity of this contention *it has been frequently decided by this Court* that whether a case arising, as this one does, under a law of the United States, is removable or not, when it is commenced (there being no claim of fraudulent

attempt to evade removal), *is to be determined by the allegations of the complaint or petition; and that if the case is not then removable, it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.* Tennessee *vs.* Union Planters Bank, 152 U. S., 454; 38 L. Ed., 511; 14 Sup. Ct. Rep., 654; Chappell *vs.* Waterworth, 155 U. S., 102; 39 L. Ed., 85; 15 Sup. Ct. Rep., 34; Texas & P. R. Co. *vs.* Cody, 166 U. S., 606; 41 L. Ed., 1132; 17 Sup. Ct. Rep., 703; Taylor *vs.* Anderson, 234 U. S., 74; 58 L. Ed., 1218; 34 Sup. Ct. Rep., 724.

* * * * * * *

"The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, *the plaintiff may, by the allegations of his complaint, determine the status with respect to removability of a case arising under a law of the United States,* when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case, non-removable when commenced, shall afterwards become removable, depends not upon what the defendant may allege or prove, or what the Court may, after hearing upon the merits, *in invitum,* order, *but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.*" (Italics are ours, here and throughout this brief.)

The mere fact that the charge of negligence embraces, *inter alia,* a failure to comply with some of the Interstate Commerce Commission's regulations prescribed for the handling and storing of explosives does not make the controversy

one arising under the laws of the United States, so as to give the Federal court exclusive jurisdiction thereof (Isaac Kubie Co. *vs.* Lehigh Valley R. Co., 261 Fed., 806, 810, citing Mo. Pacific Ry. Co. *vs.* Fitzgerald, 160 U. S., 556).

Accordingly we maintain that, so far as the subject-matter of this suit was concerned, it was not removable to the Federal court, and the Supreme Court of Montana was correct in so ruling.

II.

THIS CAUSE NOT REMOVABLE TO FEDERAL COURT ON GROUND OF DIVERSITY OF CITIZENSHIP.

The complaint in this case shows, and the fact is undisputed, that the plaintiff Phelps was a citizen of the State of Wyoming, while the plaintiff Galbreath Cattle Company was a citizen of Montana and the defendant was a citizen of the State of Minnesota (R., 1, 2). For this reason we opposed the petition of the defendant for removal of this case to the Federal court, and the order of the trial court denying such petition was sustained by the Supreme Court of Montana on appeal (R., 8, 267, 279).

We urged below and still maintain that since the two plaintiffs were citizens of different States the case was controlled by the opinion of this court in Smith *vs.* Lyon (133 U. S., 315), holding that "where two plaintiffs are citizens of different States they cannot both unite in one suit in a State of which only one of them is a citizen," that being in accordance with "the long-continued construction of the statute by this court during a period of nearly a hundred years," beginning with that by Chief Justice Marshall in Strawbridge *vs.* Curtiss (3 Cranch, 267).

The opinion in Smith *vs.* Lyon was cited with approval and followed in the more recent case of Camp *vs.* Gress (250 U. S., 308), though the situation was somewhat different there, because there was but one plaintiff, while the defendants were citizens of different States. The distinction was made between such a case and the line of cases where the plaintiffs had diverse citizenship, but the principle followed in Smith *vs.* Lyon as to the latter line of cases was not departed from.

To the same effect was the decision of the District Court for the Western District of Washington in Puget Sound Sheet Metal Works *et al. vs.* Great Northern Ry. Co. (195 Fed., 350), in which the parties plaintiff were citizens of different States and the defendant was the same as the defendant here. The case had been removed to the Federal court from the Supreme Court of King County, Washington, on the diversity of citizenship, but after careful consideration of the opinions of this court in Smith *vs.* Lyon, *in re* Moore (209 U. S., 490), and *ex parte* Wisner (203 U. S., 449), Judge Hanford held that the case was not removable to the Federal court, and accordingly allowed the motion to remand. It does not appear that any appeal was taken from this decision, although the Great Northern Railway Company was represented by one of the same attorneys whom it now has in the case at bar.

Counsel for petitioner continues to cite and harp upon the recent decisions of this Honorable Court in General Investment Company *vs.* Lake Shore & M. S. Ry. Co. (43 Sup. Ct., 106) and Lee *vs.* Chesapeake & Ohio Ry. Co. (43 Sup. Ct., 230). We have studied these opinions carefully, but urge that they do not apply here. The former was removed

to the Federal court on the ground that the suit, *"according to the claim made in the bill, was one arising under the laws of the United States,"* and while "diversity of citizenship was shown (it was) not specified as a ground of removal." On the contrary, the present suit was not brought under the laws of the United States, nor was any reference whatever made to those laws in the complaint, as we have shown above.

However, assuming for the purpose of argument that these recent decisions might have application here, we respectfully urge that to reverse and remand this case by reason thereof would cause a great injustice, because they were not rendered until years after this case was tried. The trial court refused removal of the instant case to the Federal court upon authority of the opinions of this Court rendered during a period of 110 years, or from Strawbridge *vs.* Curtiss (*supra*) to Camp *vs.* Gress (*supra*), and such refusal was undoubtedly correct under that long line of decisions. The case was very fully tried and considered, an extremely lengthy record being made up, and the same has been printed, both in the Supreme Court of Montana and in this Honorable Court, at great expense. One of the plaintiffs, who was also an important witness, has died, and probably the testimony of one or more of the witnesses would not be available because of death or removal. Accordingly a new trial after the lapse of all these years would result in great hardship to the parties plaintiff.

The language of Mr. Justice Brewer in one of the above removal cases (*Re* Moore, 209 U. S., 490, 508) is quite pertinent here, namely:

> "We might also refer to the several textbooks in which is affirmed the general doctrine of the effect of the waiver of an objection to a particular court in

> which the suit has been removed. We have made these many quuotations and references, not simply to establish the doctrine itself, *but to emphasize the widespread injurious results which may be expected to follow from now enforcing a different rule;* for if, in a case between citizens of different States, of which the circuit courts of the United States are given general jurisdiction, an objection to the jurisdiction of a particular one of those courts cannot be waived and no consent can give jurisdiction, it is clear that many judgments have been rendered by those courts in reliance upon such a waiver, which will necessarily be held to be absolutely void, and the litigation must be had over again in some other courts, *resulting, possibly, in different decisions through the disappearance of witnesses, the loss of testimony, or the running of the statute of limitations.*"

While this language applied to a refusal of the Federal court to which a case had been removed to remand it to the State court, the principle applies just as well here. There is the same risk of disappearance of witnesses, there is already a loss of important testimony, and there would be the same injurious results from ordering this case removed to and retried in a Federal court after this lapse of years, and solely because of decisions rendered some years after the case had been tried in and removal properly refused by the State court.

The petitioner complains that the Supreme Court of Montana refused to follow the General Investment Company and Lee cases, although same were brought to its particular attention, one of them on the original argument and both on the petition for rehearing. We believe that court was right in so refusing and in holding the present case controlled by the decisions in Smith *vs.* Lyons and Camp *vs.*

Gress; but if not, it remains a fact that the instant case had long since been heard by the trial court and the entire record of evidence made up, so that to allow the petition for removal would have been merely to invite those "widespread injurious results" which Mr. Justice Brewer so ably describes in the Moore case (*supra*).

In other words, at the time the State court denied the petition for removal, it could not do otherwise than follow the rulings of the Supreme Court of the United States rendered during a period of more than a century. Not only were the General Investment Company and Lee decisions not then printed or rendered, but the earlier decisions were still in force and even *Ex parte* Wisner and *In re* Moore (*supra*) were not expressly overruled by this Honorable Court, as held by District Judge Hanford in Puget Sound Sheet Metal Works *et al. vs.* Great Northern Ry. Co. (195 Fed. Rep., 350), citing *Ex parte* Harding (219 U. S., 363). And even in the dissenting opinion of Mr. Chief Justice Fuller in the Moore case (209 U. S., 490, 508) there was a concurrence in the opinion of the majority that the plaintiff could not by his assent invest the court with jurisdiction.

We also understand that Judge Bourquin, of the United States District Court for the District of Montana, had been consistently holding, prior to the ruling by the trial court in the instant case, that cases involving plaintiffs who did not both reside in the State were not removable, and consequently the trial court followed his rulings as well as those of the highest court in the land. The fact that there may have been a change several years later, and just prior to the decision of the Supreme Court of Montana on motion for rehearing (which we do not admit), does not demonstrate

that the trial court acted erroneously in refusing to allow removal of this case in August, 1919. This case, we respectfully urge, should be adjudicated on the point of removal by the conditions then existing and in the light of the long line of decisions then in full force and effect, rather than upon the possible change of rulings which came about several years later. The trial court was then duly authorized to deny the petition for removal, and the plaintiffs in the case (respondents here) should not be penalized even if the Lee and Investment Company cases be construed as overturning all the prior Federal decisions.

As to the case of Central Coal and Coke Company *vs.* Oeepek (67 Law Ed., 480, 823), these are only memorandum decisions, and hence we are not aware whether they apply or not. However, from the title it is apparent that there is only one plaintiff and one defendant in that case, so they cannot have any close application here.

We therefore maintain that on the point of diversity of citizenship this case was not removable, and the Supreme Court of Montana correctly so held.

III.

NO OTHER FEDERAL QUESTION INVOLVED.

In its petition and accompanying brief the Great Northern Railroad Company has entered upon a rather elaborate argument upon the merits of the case. We shall not follow it in this, as that would seem not involved in the question whether the petition for certiorari should be granted. We argued the merits at some length in our brief submitted last year when the case was before this Court previously (No. 312,

October term, 1923), and if necessary can refer to pages 6 to 18 of that brief.

However, we cannot refrain from pointing out that the petitioner's claim that the loss of cattle was mainly due to failure to give the animals care at Great Falls is wholly incorrect and inconsistent with the theory upon which the case was tried by it, that theory being that the cattle were not properly handled and watered before being loaded at Cody. This theory was followed by it in the trial of the case and established by its examination of the expert veterinary witnesses placed upon the stand.

Petitioner has based an elaborate argument upon the court's refusal to give his requested instructions Nos. 27 and 27A with regard to the general duty of caring for the animals in transit, but we suggest that he has unconsciously misstated or given the wrong effect to that portion of the record. The court did not directly charge that it was the duty of defendant to unload, feed, and water the cattle, but merely that *if* the defendant undertook to and did unload the cattle, "then it was the duty to unload the cattle in a humane manner into pens properly equipped for rest, water, and feeding." There surely was evidence introduced from which the jury could find that the defendant entered into such undertaking without request from anyone, and that not only did it assist in the unloading, but took charge of the unloading and watering. The caretaker assisted in this work, though protesting at the brutality shown by defendant's employees and trying to prevent such brutality.

Accordingly the authorities cited by the petitioner are not in point here, but there are others holding that where the shipper defaults in unloading, whereupon the carrier unloads

and makes a charge for feeding, the shipper can recover any damages sustained in such operations (Chicago, R. I. & P. R. Co. *vs.* Scott (Texas), 156 S. W., 294; Snyder *vs.* King (Mich.), 165 N. W., 840; I. A. R. L., 893; Gilbert *vs.* C., R. I. & P. Ry. Co., 132 Mo. App., 697, 122 S. W., 1002; Pecos & Northern Tex. R. Co. *vs.* Meyer (Texas), 155 S. W., 309, 6 N. C. C. A., 146).

There are also decisions that the carrier must take reasonable precaution against delay in handling shipments of live stock and must anticipate probable results from weather conditions that may be foreseen (Chicago, B. & Q. R. Co. *vs.* Simpson Bros., 23 Wyo., 342, 151 Pac., 902; Nelson *vs.* Great Northern R. Co., 28 Mont., 297).

It is true that the Supreme Court of Montana found error in plaintiff's requested instruction No. 8, but only in the final clause, namely, "while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana." However, after eliminating from consideration that fact, and also the loss of the thirteen head of cattle which died after the reshipment from Great Falls, the court found itself confronted with the situation (R., 277) "that as to the remaining 142 head there was a direct conflict in the testimony upon all of the alleged negligent acts of the defendant and the alleged acts of contributory negligence on the part of the plaintiffs. These matters were all thoroughly tried and submitted to the jury for their determination under proper and sufficient instructions. The jury resolved these issues in favor of the plaintiffs. From the record, we cannot say that their finding in that respect was against the weight of the evidence." For these reasons the alleged error in part

of the instructions was not a prejudicial one, so as to necessitate a new trial, especially in view of the court's requirement for plaintiffs to consent to reduction of the judgment in the sum of $1,020.

The petitioner contends that the court's instructions placed the burden of proof upon the defendant, but we urge that this is not justified. As above stated, the court merely instructed the jury that *if* the carrier undertook to and did unload the cattle, then they should have done it in a proper and humane manner.

So, by plaintiff's requested instruction No. 11, the court advised that *if* you find for the plaintiff and *if* you find that the loss and injuries to the cattle were caused by negligence of the defendant you should award damages (R., 249).

Furthermore, by the giving of defendant's requested instructions Nos. 2, 4, 8, 10, 13, 15, 16, 19, 21, 22, and 25 the jury was instructed not to render verdict for plaintiff unless they found that the damage was due to the sole negligence of defendant, and was not due to hard driving or feeding before loading, nor to the animals being too heavily loaded in the cars, nor to their being in poor shipping condition, nor to their being overheated before delivery to the defendant's carrier in Montana, nor to any act of contributory negligence on the part of plaintiffs or their agents.

And, finally, the jury was instructed, as requested in defendant's offered instruction No. 1, that *"the burden rests upon the plaintiffs to prove the essential elements of their complaint by a fair preponderance of the proofs, and that therefore in this case plaintiffs must establish by such preponderance of proof, not only that the defendant was negli-*

gent, but also that such negligence, if any, was the direct and proximate cause of plaintiff's damage, if any."

Surely these instructions do not place the burden of proof upon defendant, as argued here on his behalf, but instead protect carefully every right he had in the case. Some of the instructions, being based on partial defenses, although no partial defense was pleaded, should not have been given, in our opinion (McKin *vs.* Beiseker, 56 Mont., 330, 185 Pac., 153; Cornell *vs.* Great Northern R. Co., 57 Mont., 177; 187 Pac., 902); however, we made no objection to them, and hence defendant had the benefit of them. Everything considered, he has no just cause of complaint against any instruction in this case given to the jury (Moyse *vs.* Northern Pacific R. Co., 41 Mont., 272; 108 Pac., 1062).

Finally, the court's instructions on the burden of proof were in accordance with the ruling in that State, as laid down in the case of Nelson *vs.* Great Northern Ry. Co. (28 Mont., 297) and in the later case of Heitman *vs.* Chicago, Milwaukee & St. Paul R. Co. (45 Mont., 406).

We therefore maintain that no Federal question can be conjured out of the instructions to the jury or the refusal of instructions requested by petitioner or the rulings of the Supreme Court of Montana thereon. In this connection we refer to the recent opinion of this Court in Petrie *vs.* Nampa and M. Irrig. Dist. (248 U. S., 154) to the effect that "even if it be conceded that the supreme court decided a Federal question against the plaintiffs in error, nevertheless, the court decided against them also upon an independent ground, not involving any Federal question and broad enough to support the judgment, and for this reason the Federal question involved will not be considered on this writ of error, under

a series of decisions by this Court, extending at least from Klinger *vs.* Missouri, 13 Wall., 257, 263; 20 L. Ed., 635, 637, to Enterprise Irrig. Dist. *vs.* Farmers' Mut. Canal Co., 243 U. S., 157, 164; 61 L. Ed., 644, 648; 37 Sup. Ct. Rep., 318."

We do not by this citation admit that there was any Federal question involved here.

Finally, we wish to answer briefly the contention of petitioner that the delays which have occurred in this case have been in any way our fault; this being evidently an attempt on their part to answer our contention as to the injustice which would be caused respondents by a removal of this cause to the Federal court for trial after all these years, and to our quotation of Mr. Justice Brewer's language in the Moore decision (*supra*). Certainly it is rather gratuitous for petitioner to urge that the respondents are responsible for the delays. At the time he commenced proceedings for the purpose of securing a writ of certiorari he should have been familiar with the numerous holdings of this Court and all the Federal courts that an appeal or writ of error could be taken only from a *final* decision. He should also be familiar with the rulings of the Supreme Court of Montana to the effect that "an appeal from a judgment of the court below, entered in conformity to the judgment and order of the supreme court on a former appeal will be dismissed, as being in effect an appeal from the supreme court's own judgment" (Kimpton *vs.* Jubilee Placer Co., 22 Mont., 107). To the same effect are the rulings of the Federal courts (Stewart *vs.* Salamon, 97 U. S., 361) and other decisions cited in the Kimpton case (*supra*). In this connection we note that petitioner is evidently unaware whether he is seeking a writ from the

judgment of the District Court of Yellowstone County or from the Supreme Court of Montana. (See page 5 of petition.)

Petitioner also urges that we are partly responsible for the delays because we argued before the Supreme Court of Montana that the Lee and Investment Company cases should not be followed, but, as above set forth, the case had previously been tried at great expense under the decisions previously in force, and we were fully justified in arguing against a removal and retrial on the strength of later decisions.

Finally, petitioner appears to argue that because his previous writ was granted this one should be also. We urge, however, that in our brief opposing the allowance of the writ we urged the same point upon which the case after allowance of the writ was dismissed, namely, that the decision below cited was not a final one. As this was evidently not considered by the court in allowing the former writ, we respectfully suggest that its decision on the other points should not necessarily be followed, but that the case be considered as though no previous writ had been granted.

We respectfully contend that the petition sets up no good ground for the allowance of the writ of certiorari, and hence pray that such writ be denied.

Respectfully submitted,

E. E. ENTERLINE,
SAMUEL HERRICK,
Attorneys for Respondents.

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A recent case to the same effect is Great Northern Ry. Co. *vs.* Alexander (246 U. S., 276, 281, 282), in which there was the same defendant as in the present case, it was represented by the same attorney, and he advanced the same contention, but this Court, through Mr. Justice Clarke, thus ruled:

> "But unfortunately for the validity of this contention *it has been frequently decided by this Court* that whether a case arising, as this one does, under

a law of the United States, is removable or not, when it is commenced (there being no claim of fraudulent attempt to evade removal), *is to be determined by the allegations of the complaint or petition; and that if the case is not then removable, it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.* Tennessee *vs.* Union Planters Bank, 152 U. S. 454; Chappell *vs.* Waterworth, 155 U. S., 102; Texas & P. R. Co. *vs.* Cody, 166 U. S., 606; Taylor *vs.* Anderson, 234 U. S., 74.

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"The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the *plaintiff may, by the allegations of his complaint, determine the status with respect to removability of a case arising under a law of the United States,* when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case, non-removable when commenced, shall afterwards become removable, depends not upon what the defendant may allege or prove, or what the Court may, after hearing upon the merits, *in invitum*, order, *but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.*" (Italics are ours, here and throughout this brief.)

The mere fact that the charge of negligence embraces, *inter alia*, a failure to comply with some of the Interstate Commerce Commission's regulations prescribed for the handling and storing of explosives does not make the controversy one arising under the laws of the United States, so as to give

the Federal court exclusive jurisdiction thereof (Isaac Kubie Co. *vs.* Lehigh Valley R. Co., 261 Fed., 806, 810, citing Mo. Pacific Ry. Co. *vs.* Fitzgerald, 160 U. S., 556).

And in the recent case of Oregon-Washington R. & Nav. Co. *vs.* McGinn (258 U. S., 409, 413), it was held by this court through Mr. Justice Clarke that "the Cummins Amendment to the Carmack Amendment to the Interstate Commerce Act deals with and modifies *the common-law liability only of the initial carrier.* It * * * *leaves the relation of all connecting carriers,* including the terminal carrier, to the shipper or consignee and to each other, *entirely unaffected* (Atlantic Coast Line R. Co. *vs.* Riverside Mills, 219 U. S., 186; Adams Exp. Co. *vs.* Croninger, 226 U. S., 491); and therefore their liability is as we have stated it, unless modified by contract, and in this case, as we have seen, the live-stock contract under which the shipment moved, * * * *leaves the common-law liability of the intermediate carrier entirely unaffected, just as the statute leaves it.*" These words apply with equal strength to the facts of the present case, and demonstrate that the Carmack Amendment has no application to the common-law liability made the subject of this action.

Accordingly we maintain that, so far as the subject-matter of this suit was concerned, it was not removable to the Federal court, and the Supreme Court of Montana was correct in so ruling.

II.

THIS CAUSE NOT REMOVABLE TO FEDERAL COURT ON GROUND OF DIVERSITY OF CITIZENSHIP.

The complaint in this case shows, and the fact is undisputed, that the plaintiff Phelps was a citizen of the State of Wyoming, while the plaintiff Galbreath Cattle Company was a citizen of Montana and the defendant was a citizen of the State of Minnesota (R., 1, 2). For this reason we opposed the petition of the defendant for removal of this case to the Federal Court, and the order of the trial court denying such petition was sustained by the Supreme Court of Montana on appeal (R., 8, 267, 269).

We urged below and still maintain that since the two plaintiffs were citizens of different States the case was controlled by the opinion of this court in Smith *vs.* Lyon (133 U. S., 315), holding that "where two plaintiffs are citizens of different States they cannot both unite in one suit in a State of which only one of them is a citizen," that being in accordance with "the long-continued construction of the statute by this court during a period of nearly a hundred years," beginning with that by Chief Justice Marshall in Strawbridge *vs.* Curtiss (3 Cranch, 267).

The opinion in Smith *vs.* Lyon was cited with approval and followed in the more recent case of Camp *vs.* Gress (250 U. S., 308), though the situation was somewhat different there, because there was but one plaintiff, while the defendants were citizens of different States. The distinction was made between such a case and the line of cases where the

plaintiffs had diverse citizenship, but the principle followed in Smith *vs.* Lyon as to the latter line of cases was not departed from.

To the same effect was the decision of the District Court for the Western District of Washington in Puget Sound Sheet Metal Works *et al. vs.* Great Northern Ry. Co. (195 Fed., 350), in which the parties plaintiff were citizens of different States and the defendant was the same as the defendant here. The case had been removed to the Federal court from the Supreme Court of King County, Washington, on the diversity of citizenship, but after careful consideration of the opinions of this court in Smith *vs.* Lyon, *in re* Moore (209 U. S., 490), and *ex parte* Wisner (203 U. S., 449), Judge Hanford held that the case was not removable to the Federal court, and accordingly allowed the motion to remand. It does not appear that any appeal was taken from this decision, although the Great Northern Railway Company was represented by one of the same attorneys whom it has had in the case at bar.

Counsel for petitioner continues to cite and rely upon the recent decisions of this Honorable Court in General Investment Company *vs.* Lake Shore & M. S. Ry. Co. (260 U. S., 261) and Lee *vs.* Chesapeake & Ohio Ry. Co. (260 U. S., 653). We have studied these opinions carefully, but urge that they do not apply here. The former was removed to the Federal court on the ground that the suit, "*according to the claim made in the bill, was one arising under the laws of the United States,*" and while "diversity of citizenship was shown (it was) not specified as a ground of removal"; while, on the contrary, the present suit was not brought under the laws of the United States, nor was any reference

whatever made to those laws in the complaint, as we have shown above. And as to the Lee case, that involved only a single plaintiff and a single defendant, hence is entirely different as to citizenship from the case at bar.

However, assuming for the purpose of argument that these recent decisions do have application here, we respectfully urge that to reverse and remand this case by reason thereof would cause a great injustice, because they were not rendered until years after this case was tried. The trial court refused removal of the instant case to the Federal court upon authority of the opinions of this Court rendered during a period of 110 years, or from Strawbridge *vs.* Curtiss (*supra*) to Camp *vs.* Gress (*supra*), and such refusal was undoubtedly correct under that long line of decisions. The case was very fully tried and considered, an extremely lengthy record being made up, and the same has been printed, both in the Supreme Court of Montana and in this Honorable Court, at great expense. One of the plaintiffs, who was also an important witness, has died, and probably the testimony of one or more of the witnesses would not be available because of death or removal. Accordingly a new trial after the lapse of all these years would result in great hardship to the parties plaintiff.

The language of Mr. Justice Brewer in one of the above removal cases (*Re* Moore, 209 U. S., 490, 508) is quite pertinent here, namely:

> "We might also refer to the several textbooks in which is affirmed the general doctrine of the effect of the waiver of an objection to a particular court in which the suit has been removed. We have made these many quotations and references, not simply to

> establish the doctrine itself, *but to emphasize the widespread injurious results which may be expected to follow from now enforcing a different rule;* for if, in a case between citizens of different States, of which the circuit courts of the United States are given general jurisdiction, an objection to the jurisdiction of a particular one of those courts cannot be waived and no consent can give jurisdiction, it is clear that many judgments have been rendered by those courts in reliance upon such a waiver, which will necessarily be held to be absolutely void, and the litigation must be had over again in some other courts, *resulting, possibly, in different decisions through the disappearance of witnesses, the loss of testimony, or the running of the statute of limitations.*"

While this language applied to a refusal of the Federal court to which a case had been removed to remand it to the State court, the principle applies just as well here. There is the same risk of disappearance of witnesses, there is already a loss of important testimony, and there would be the same injurious results from ordering this case removed to and retried in a Federal court after this lapse of years, and solely because of decisions rendered some years after the case had been tried in and removal properly refused by the State court.

As held by the Supreme Court of Wyoming in the case of Kelly *vs.* Rhoades, County Assessor (7 Wyo., 237, 279),

> "The effect of a decision of the Supreme Court construing a statute, renders it the law for the time being as so construed. *Parties have a right to act upon such a decision and no injury ought to be allowed to result, by reason of a dependence thereon,*

> *if the decision is subsequently changed, any more than in case of a repeal of a statute.* Hollinshead *v.* Von Glahr, 4 Minn., 190. Until the decision now rendered, since the announcement of the Court in the cases hereinbefore referred to, the law of the State has been as set forth and adjudged in those cases, at least to the extent that no one should be injured by relying thereon. *Consequently, any case which has been brought against the collecting officer in his individual capacity, should be permitted to proceed without objection on that ground.* This case is not against the officer individually."

An interpretation which gives to a law, an order of a department or a decision of a Court the vicious effect of retrospective action should always be carefully avoided.

Jeedicke *vs.* U. S., 85 F., 372 at 375.

And the following language of Mr. Justice Sanborn when on the Eighth Circuit Court of Appeals is also apropos, to-wit:

> "Neither courts nor legislatures should give a retrospective effect to radical changes in rules of property or of practice." Again,—"It is a maxim of the law 'that an act of court should prejudice no man.'" (Shreve *vs.* Cheesman, 69 Fed., 785, 792.)

The petitioner complains that the Supreme Court of Montana refused to follow the General Investment Company and Lee cases, although same were brought to its particular attention, one of them on the original argument and both on the petition for rehearing. Without arguing that said court was right in so refusing and in holding the present case controlled by the decisions in Smith *vs.* Lyons and Camp *vs.*

Gress, it remains a fact that the instant case had long since been heard by the trial court and the entire record of evidence made up, so that to allow the petition for removal would have been merely to invite those "widespread injurious results" which Mr. Justice Brewer so ably describes in the Moore case (*supra*).

In other words, at the time the State court denied the petition for removal, it could not do otherwise than follow the rulings of the Supreme Court of the United States rendered during a period of more than a century. Not only were the General Investment Company and Lee decisions not then printed or rendered, but the earlier decisions were still in force and even *Ex parte* Wisner and *In re* Moore (*supra*) were not expressly overruled by this Honorable Court, as held by District Judge Hanford in Puget Sound Sheet Metal Works *et al. vs.* Great Northern Ry. Co. (195 Fed. Rep., 350), citing *Ex parte* Harding (219 U. S., 363). And even in the dissenting opinion of Mr. Chief Justice Fuller in the Moore case (209 U. S., 490, 508) there was a concurrence in the opinion of the majority that the plaintiff could not by his assent invest the court with jurisdiction.

We also understand that Judge Bourquin, of the United States District Court for the District of Montana, had been consistently holding, both before and after the ruling by the trial court in the instant case, that cases involving plaintiffs who did not both reside in the State were not removable, and consequently the trial court followed his ruling as well as those of the highest court in the land. To the same effect was Boise Commercial Club *vs.* Oregon Short Line Ry. Co. (260 F., 769), a decision of the Ninth Circuit Court of Appeals, in which Montana is included. That decision, of

course, was rendered in October, 1919, and the denial of the removal here was entered in July, 1919, although the case was not tried until December, 1920. Yet it is quite evident that if this case had been removed to the Federal Court for the District of Montana, Judge Bourquin would have remanded it. The fact that there may have been a change several years later, and just prior to the decision of the Supreme Court of Montana on motion for rehearing, does not demonstrate that the trial court acted erroneously in refusing to allow removal of this case in August, 1919. This case, we respectfully urge, should be adjudicated on the point of removal by the conditions then existing and in the light of the long line of decisions then in full force and effect, rather than upon the possible change of rulings which came about several years later. The trial court was then duly authorized to deny the petition for removal, and the plaintiffs in the case (respondents here) should not be penalized even if the Lee and Investment Company cases be construed as overturning all the prior Federal decisions.

It has been the uniform holding of the Supreme Court of the United States that the State courts are bound to follow the construction placed by that Court upon a Federal statute. The District Court of Yellowstone County, Montana, was therefore within its legal right in denying the application to remove—indeed it was the duty of that Court to deny the application because according to the then existing decisions the Federal Court for the District of Montana would have been compelled to remand the cause to the State court, so that such removal would have simply caused delay in the trial. We earnestly urge that the respondents in this case should not now be penalized by reason of the State court fol-

lowing the decisions of the United States Supreme Court and of the lower Federal courts, and that if ever the principles announced by Judge Brewer in *In re* Moore should be followed, they should be in the instant case.

Decisions of a court of last resort are to be regarded as law, and should be followed by inferior courts whatever the view of the latter may be as to their correctness, until they have been reversed or overruled. 15 C. J., 1920.

We therefore maintain that on the point of diversity of citizenship this case was not removable, and the Supreme Court of Montana correctly so held.

III.

NO OTHER FEDERAL QUESTION INVOLVED.

In its petition and accompanying brief the Great Northern Railroad Company has entered upon a rather elaborate argument upon the merits of the case. We shall not follow it in this, as we argued the merits at some length in our brief submitted when the case was before this Court previously (No. 312, October term, 1923), and if necessary can refer to pages 6 to 18 of that brief.

However, we cannot refrain from pointing out that the petitioner's claim that the loss of cattle was mainly due to failure to give the animals care at Great Falls is wholly incorrect and inconsistent with the theory upon which the case was tried by it, *i. e.*, that the cattle were not properly handled and watered before being loaded at Cody (R., 118 *et seq.*). This theory was followed by it in the trial of the case and established by its examination of the expert veteri-

nary witnesses placed upon the stand (R., 172 *et seq.*), especially the concluding part of Dr. Nutting's testimony (R., 173-187).

At pages 181 to 183 of the record there is a report that Dr. Knowles had prepared and sought vainly to get the plaintiff's veterinarian to sign; and testimony which conclusively establishes that the defendant endeavored to prove that the damage was done at Cody before loading, because in the concluding paragraph these two veterinarians for defendant conclude that the disease and death of the cattle at Great Falls was *wholly* due to the alleged neglect and improper way in which they were handled previous to the time they were loaded on the cars at Cody.

Dr. Knowles in his direct examination also placed the responsibility upon the plaintiff's methods of handling the cattle before loading (R., 193, 194, 198). Dr. Embree and the other veterinarian (R., 209, 211) conclude that the animals were "scared" when they were first put under a roof in the cars, and that this, together with the manner in which they were handled at Cody, brought on circulatory disturbances.

Learned counsel who prepared the brief for defendant, both in this court and in the Supreme Court of Montana, ignored this testimony given by his own veterinarians. But the fact remains that the case was tried by defendant on the theory that the damages occurred prior to and at the time of the loading of the cattle at Cody, and that there has been a change of front evidently for the purpose of making capital out of one of the charges to the jury with regard to the unloading and care of the cattle at Great Falls.

Petitioner has based an elaborate argument upon the court's refusal to give his requested instructions Nos. 27 and 27A with regard to the general duty of caring for the animals in transit, but we suggest that he has unconsciously misstated or given the wrong effect to that portion of the record. The court did not directly charge that it was the duty of defendant to unload, feed, and water the cattle, but merely that *if* the defendant undertook to and did unload the catle, "then it was the duty to unload the cattle in a humane manner into pens properly equipped for rest, water, and feeding." There surely was evidence introduced from which the jury could find that the defendant entered into such undertaking without request from anyone, and that not only did it assist in the unloading, but took charge of the unloading and watering. The caretaker assisted in this work, though protesting at the brutality shown by defendant's employees and trying to prevent such brutality.

Accordingly, the authorities cited by the petitioner are not in point here, but there are others holding that where the shipper defaults in unloading, whereupon the carrier unloads and makes a charge for feeding, the shipper can recover any damages sustained in such operations (Chicago, R. I. & P. R. Co. *vs.* Scott (Texas), 156 S. W., 294; Snyder *vs.* King (Mich.), 165 N. W., 840; I A. R. L., 893; Gilbert *vs.* C., R. I. & P. Ry. Co., 132 Mo. App., 697, 122 S. W., 1002; Pecos & Northern Tex. R. Co. *vs.* Meyer (Texas), 155 S. W., 309, 6 N. C. C. A., 146).

There are also decisions that the carrier must take reasonable precaution against delay in handling shipments of live stock and must anticipate probable results from weather conditions that may be foreseen (Chicago, B. & Q. R. Co.

vs. Simpson Bros., 23 Wyo., 342, 151 Pac., 902; Nelson *vs.* Great Northern R. Co., 28 Mont., 297).

It is true that the Supreme Court of Montana found error in plaintiff's requested instruction No. 8, but only in the final clause, namely, "while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana." However, after eliminating from consideration that fact, and also the loss of the thirteen head of cattle which died after the reshipment from Great Falls, the court found itself confronted with the situation (R., 275) "that as to the remaining 142 head there was a direct conflict in the testimony upon all of the alleged negligent acts of the defendant and the alleged acts of contributory negligence on the part of the plaintiffs. These matters were all thoroughly tried and submitted to the jury for their determination under proper and sufficient instructions. The jury resolved these issues in favor of the plaintiffs. From the record, we cannot say that their finding in that respect was against the weight of the evidence." For these reasons the alleged error in part of the instructions was not a prejudicial one, so as to necessitate a new trial, especially in view of the court's requirement for plaintiffs to consent to reduction of the judgment in the sum of $1,020.

The petitioner contends that the court's instructions placed the burden of proof upon the defendant, but we urge that this is not justified. As above stated, the court merely instructed the jury that *if* the carrier undertook to and did unload the cattle, then they should have done it in a proper and humane manner.

So, by plaintiff's requested instruction No. 11, the court advised that *if* you find for the plaintiff and *if* you find that the loss and injuries to the cattle were caused by negligence of the defendant you should award damages (R., 248).

Furthermore, by the giving of defendant's requested instructions Nos. 2, 4, 8, 10, 13, 15, 16, 19, 21, 22, and 25 the jury was instructed not to render verdict for plaintiff unless they found that the damage was due to the sole negligence of defendant and was not due to hard driving or feeding before loading, nor to the animals being too heavily loaded in the cars, nor to their being in poor shipping condition, nor to their being overheated before delivery to the defendant's carrier in Montana, nor to any act of contributory negligence on the part of plaintiffs or their agents.

And, finally, the jury was instructed, as requested in defendant's offered instruction No. 1, that "*the burden rests upon the plaintiffs to prove the essential elements of their complaint by a fair preponderance of the proofs, and that therefore in this case plaintiffs must establish by such preponderance of proof, not only that the defendant was negligent, but also that such negligence, if any, was the direct and proximate cause of plaintiff's damage, if any.*"

Surely these instructions do not place the burden of proof upon defendant, as argued here on his behalf, but instead protect carefully every right he had in the case. Some of the instructions, being based on partial defenses, although no partial defense was pleaded, should not have been given, in our opinion (McKin *vs.* Beiseker, 56 Mont., 330, 185 Pac., 153; Cornell *vs.* Great Northern R. Co., 57 Mont., 177; 187 Pac., 902); however, we made no objection to them, and hence defendant had the benefit of them. Everything con-

sidered, he has no just cause of complaint against any instruction in this case given to the jury (Moyse *vs.* Northern Pacific R. Co., 41 Mont., 272; 108 Pac., 1062).

Finally, the court's instructions on the burden of proof were in accordance with the ruling in that State, as laid down in the case of Nelson *vs.* Great Northern Ry. Co. (28 Mont., 297) and in the later case of Heitman *vs.* Chicago, Milwaukee & St. Paul R. Co. (45 Mont., 406).

We therefore maintain that no Federal question can be conjured out of the instructions to the jury or the refusal of instructions requested by petitioner or the rulings of the Supreme Court of Montana thereon. In this connection we refer to the recent opinion of this Court in Petrie *vs.* Nampa and M. Irrig. Dist. (248 U. S., 154) to the effect that "even if it be conceded that the supreme court decided a Federal question against the plaintiffs in error, nevertheless, the court decided against them also upon an independent ground, not involving any Federal question and broad enough to support the judgment, and for this reason the Federal question involved will not be considered on this writ of error, under a series of decisions by this Court, extending at least from Klinger *vs.* Missouri, 13 Wall., 257, 263, to Enterprise Irrig. Dist. *vs.* Farmers' Mut. Canal Co., 243 U. S., 157, 164."

We do not by this citation admit that there was any Federal question involved here.

Finally, we wish to answer briefly the contention of petitioner that the delays which have occurred in this case have been in any way our fault; this being evidently an attempt on their part to answer our contention as to the injustice which would be caused respondents by a removal of this cause to the Federal court for trial after all these years, and

to our quotation of Mr. Justice Brewer's language in the Moore decision (*supra*). Certainly it is rather gratuitous for petitioner to urge that the respondents are responsible for the delays. At the time he commenced proceedings for the purpose of securing a writ of certiorari he should have been familiar with the numerous holdings of this Court and all the Federal courts that an appeal or writ of error could be taken only from a *final* decision. He should also have been familiar with the rulings of the Supreme Court of Montana to the effect that "an appeal from a judgment of the court below, entered in conformity to the judgment and order of the supreme court on a former appeal will be dismissed, as being in effect an appeal from the supreme court's own judgment" (Kimpton *vs.* Jubilee Placer Co., 22 Mont., 107). To the same effect are the rulings of the Federal courts (Stewart *vs.* Salamon, 97 U. S., 361) and other decisions cited in the Kimpton case (*supra*).

Petitioner also urges that we are partly responsible for the delays because we argued before the Supreme Court of Montana that the Lee and Investment Company cases should not be followed, but, as above set forth, the case had previously been tried at great expense under the decisions previously in force, and we were fully justified in arguing against a removal and retrial on the strength of later decisions, which decisions we believed were not controlling.

We respectfully contend that the petition sets up no good ground for the reversal of the decision below, and hence pray an affirmance thereof.

Respectfully submitted,

E. E. ENTERLINE,
SAMUEL HERRICK,
Attorneys for Respondents.